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PAUL REYNOLDS CONSULTANT

May 13, 1995

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Mr. William F. Caton, Secretary
FEDERAL COMMUNICATIONS COMMISSION
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: Petition for Rule Making
Deleting Ch 287C2 Selma, AL
Substituting Ch 287C2 Thomaston, AL

Dear Mr. Caton:

Enclosed please find a petition for rule making that we wish to file for our clients, Earl Snowden and Kenneth R. Rainey, Sr. Snowden and Rainey proposed to delete unused channel 287C2 at Selma, Alabama, and substitute the same at Thomaston, Alabama.

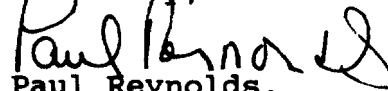
Channel 287C2 was allocated to Selma in MM Docket 84-231, however, a CP for this facility was recently cancelled and the call sign deleted.

A courtesy copy of this petition is being forwarded to Mr. Jim Crutchfield of the FM Branch. The petitioners are also requesting that a stay concerning a new applications window be placed on this allocation until the Allocations Branch decides on the merits of the instant petition.

A copy labeled "Receipt Stamp Copy" is included and attached to an addressed and stamped envelope. Please have someone in your office receipt this copy and return it to us for the petitioners files.

Thank you for your assistance in getting this petition filed.

Sincerely,


Paul Reynolds,
Consultant

No. of Copies rec'd
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MMB

BROADCAST INDUSTRY CONSULTING

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In The Matter of)
)
Amendment of Section 73.202(b),) MM Docket _____
Table of Allotments,)
FM Broadcast Stations) RM _____
(Selma and Thomaston, Alabama))

To:
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

RECEIVED

MAY 17 1985

FCC MAIL ROOM

PETITION FOR RULE MAKING

Earl Snowden and Kenneth R. Rainey, Sr. ("Snowden & Rainey") Jointly hereby petitions the Commission to delete unused channel 287C2 at Selma, Alabama, and substitute the same channel to the community of Thomaston, Alabama, as that community's first local service.

BACKGROUND

Channel 287C2 was allocated to Selma, Alabama, in MM Docket 84-231. An applications window was opened with only one applicant filing for a construction permit. At this time it is unclear as to the actual individual applicant, however, the permittee evolved to be Broadcasting Company of Selma, Inc. ("BCSI"). BCSI subsequently sold the CP to FM 103 Corporation ("FM 103"). Before the transfer of the CP

to FM 103, at least two extensions were granted to BCSI and then an additional one was granted to FM 103. The last extension advised FM 103 that further extensions were not contemplated. However, it appears to Snowden & Rainey that the CP was allowed to expire on its own before FM 103 filed an additional Form 307, and that this application was filed after the time limitation for requesting that an expired CP be reinstated.

Therefore, in a Staff letter to the FM 103 legal counsel dated March 6, 1995, the Chief of the Audio Services Division advised that its last Form 307 has been denied. See Commission letter reply reference 1800B3-RRC. A copy of this letter is included as Exhibit A.

If the Commission follows normal FM Branch policy, a new applications window will now be opened for new applicants at Selma and channel 287C2. Therefore, Snowden & Rainey submits this petition and request that the Allocations Branch give it full consideration before the opening of an applications window.

THOMASTON, ALABAMA

Thomaston is located in Marengo County Alabama. It receives city grade service from two FM radio stations licensed to Linden, Alabama, however, there is no local service. Thomaston is an incorporated community with a mayor and city council, public utilities, city police, city library, civic clubs, business district, schools and all

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other indecia used by the Commission to determine if a community has the criteria to have an allocation. Additional community data concerning Thomaston can be furnished to the Commission if necessary.

ARGUMENT

Snowden & Rainey hereby state that since the channel is presently unoccupied and there are no outstanding applicants, the Commission can consider his petition. Basically Snowden & Rainey request that the Commission deleted the unused channel 287C2 at Selma and substitute it at Thomaston, Alabama.

1. PRESENT SELMA AURAL SERVICE

Selma is located in Dallas County Alabama. There is a total Dallas county Alabama population of 54,642 persons, including Selma, according to the 1990 census. Selma is served by two class C2 FM stations, WALX(FM) and WDXX(FM) and three AM stations; WHBB (co-owned with WDXX), WMRK (co-owned with WALX) and independent WTQX-AM. Additionally, Selma is provided city grade service by WJAM(FM) Orrville, Alabama. Therefore, as verified in the attached engineering statement, Selma has six community service contours in addition to several other contours of 60 dBu (1 mV/m) or less from outside the market. The allocation of channel

287C2 at Selma will make it the seventh local service contour.

2. LACK OF PUBLIC INTEREST IN CHANNEL 287C2

The allocation of channel 287C2 at Selma has created little interest in the broadcast community, or general public, as demonstrated by there being only one applicant when the original window was opened. Additionally, if there had been a strong community demand for channel 287C2 at Selma, the former permittees could have secured buyers that would have reimbursed them for their "out of pocket" expenses and then constructed the station.

One Selma broadcaster is a minority, has a daytime AM station, and apparently has adequate funding for other construction. Had he applied, he could have claimed a minority preference and a daytime preference. However, he chose not to seek channel 287C2 at Selma.

3. THOMASTON HAS NO EXISTING LOCAL SERVICE

The Commission presently uses the following allotment priorities when allocation channels to the various communities and states. They are;

- (1). First Full-time Primary Service (White area)
- (2). Second Full-time Primary Service (Grey area)
- (3). First Local Service: and
- (4). Other Public Interest Matters

[co-equal weight given priorities (2) and (3)]

There are no areas where the deletion of channel 287C2 at Selma and its subsequent allocation at Thomaston can be decided under priorities (1) or (2). However, it can be changed from Selma to Thomaston under priority (3), "First Local Service." Snowden & Rainey previously has argued that Selma presently has six city contour services that are either licensed to Selma or a community in the same county. Presently Thomaston has no local service and only one city contour service from nearby Linden.

PETITION SUMMERIZED

The Snowden and Rainey petition can be summerized as follows;

<u>COMMUNITY</u>	<u>PRESENT</u>	<u>PROPOSED</u>
Selma	261C2, 265C2 287C2	261C2, 265C2
Thomaston	----	287C2

EXPRESSION OF INTEREST

Snowden & Rainey hereby states that they are interested in the deletion of channel 287C2 at Selma and the allocation of the same channel to Thomaston. They further certify that if channel 287C2 is allocated to Thomaston, they, or a business entity of which they are a part, will timely file an application for a construction permit for said channel. If Snowden & Rainey (or their business entity) is the successful applicant, they will construct, own, and daily operate the new station as a first local service at Thomaston.

REQUEST FOR STAY IN ISSUING AN APPLICATION WINDOW

Snowden & Rainey request that the FM Branch place a Stay or postpone the issuance of an applications window for channel 287C2 at Selma. The stay should be in effect until the Allocations Branch has adequate opportunity to determine the merits of the Snowden & Rainey PRM. Should an application window be opened, and if there were applicants, this would create confusion and complicate the Snowden & Rainey request. Parties that may wish to apply for channel 287C2 at Selma can respond during the Allocations Branch NPRM period on the Snowden & Rainey petition.

PETITIONERS PREFERENCE

Snowden & Rainey are aware of "industry speculation" concerning pending rule makings that could be issued which gives a petitioner or "finders' preference." Apparently the preference would be issued when an application window is opened. If the Commission institutes such policy while the present PRM is pending, Snowden & Rainey respectfully request that they be given this preference.

REIMBURSEMENT OF EXPENSES

It is Commission policy for adversely affected parties to be reimbursed for all expenses related to the allocation of a new channel, or upgrade of an existing facility.

However, since the CP of channel 287C2 has expired, and at this point, there are no pending applications, there are no parties that need to be reimbursed.

CONCLUSION

Earl Snowden & Kenneth R. Rainey, SR. have demonstrated that the present unused channel 287C2 allocated at Selma can be deleted and substituted to Thomaston in keeping with the Commission's present allocations procedure. Selma presently has six local services while Thomaston has none. Channel 287C2 at Thomaston meets all Commission allocations criteria and if the channel is allotted, Snowden & Rainey have verified that they, or an entity of which they are a part, will timely an application for the facility.

Allocating channel 287C2 to Thomaston is in keeping with the Commission's 307(b) mandate concerning the awarding of channels to the various communities and states.

CC: Mr. Jim Crutchfield
FM Branch
Mass Media Bureau
FEDERAL COMMUNICATIONS COMMISSION

CERTIFICATION

We, Earl Snowden and Kenneth R. Rainey, Sr.,
Petitioners for the deletion of channel 287C2 at Selma,
Alabama, and its subsequent allocation at Thomaston,
Alabama, do hereby verify that the statements contained in
this Petition for Rule Making are true and correct to the
best of our knowledge and belief. We represent that this
Petition is not filed for the purpose of impeding,
obstructing, or delaying determination on any other
application or petition with which it may be in conflict.

Respectfully Submitted,


Earl Snowden


Kenneth R. Rainey, Sr.

This 28th Day of April, 1995

Earl Snowden
Kenneth R. Rainey, Sr.
100 22nd Avenue South
Meridian, MS 39301

FEDERAL MAIL SECTION

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

6 MAR 1995

In reply refer to:
1800B3-RRC

John C. Trent, Esquire
Putbrese, Hunsacker, and Ruddy
6800 Fleetwood Road, McLean House, Suite 100
P.O. Box 539
McLean, Virginia 22101

Re: WVCA (FM), Selma, Alabama
FM 103 Corporation
Application for Extension of
Broadcast Construction Permit or
to Replace Expired Permit.
FCC File No. BMPH-921124JH

Dear Mr. Trent:

We have received and considered the above referenced application, filed on behalf of FM 103 Corporation ("FM 103"), seeking a "reinstatement" and extension of broadcast construction permit BPH-880602OE. In this application, you indicate that FM 103 has experienced difficulties with construction, but now "expects to have WVCA facility on the air within the next six months." Form 307, Exhibit 1. For the reasons stated below, we hereby deny the application.

Background

We granted the construction permit at issue in this application to FM 103's predecessor, Broadcasting Company of Selma, Inc. ("BCS"), on February 10, 1989. Subsequently, we granted BCS requests for both extension (BMPH-900807JT, granted October 19, 1990) and assignment of the construction permit (BAPH-901205GZ, granted March 8, 1991). FM 103 received the assignment with a 12-month extension, pursuant to 47 C.F.R. § 73.3535(c). We granted one additional six month extension on May 22, 1992 (BMPH-920317JF) ("the second extension"), based on FM 103's representations that it was making substantial progress toward completion. At that time, however, we advised FM 103 that further extensions were not contemplated. The second extension expired on November 23, 1992. Construction was not completed during those six months and, on November 24, despite our advisory, you filed the instant application ("the third extension request") seeking an additional extension or replacement of its construction permit.

Discussion

As an initial matter, we note that it is unclear what relief you seek. In Item 3 of the Form 307 application, you indicate that you are requesting a construction permit to replace an expired permit. However, Item 7 indicates that you seek an extension of the original construction permit. Commission regulations state that an "[a]pplication for extension of time within which to construct a station shall be filed . . . at least 30 days prior to the expiration date of the construction permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, an application will be accepted upon a showing satisfactory to the FCC of sufficient reasons for filing within 30 days prior to the expiration date." 47 C.F.R. § 73.3534(a). By contrast, Commission regulations require that an application to replace an expired construction permit be filed "within 30 days of the expiration date of the authorization sought to be replaced." 47 C.F.R. § 73.3534(e). This application was filed on November 24, 1992, one day after the construction permit expired of its own terms. We are considering your application on the merits but, because we are denying relief, we find it unnecessary to decide whether extension or replacement would be the appropriate remedy. Under the circumstances presented by your application, the analysis outlined in 47 C.F.R. § 73.3534(b) would apply to either request. See, e.g., *Macpherson Broadcasting*, 7 FCC Rcd. 6019, 6021 (1992) (applying § 73.3534(b) criteria to replacement application).

Section 319(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 319(b), requires construction permits issued by the Commission to "show specifically the earliest and latest dates" between which the operation of the station is expected to begin, and gives the Commission discretion to grant additional time for construction. Implementing this Congressional directive, the Commission established a maximum initial construction period for new permittees. See *Mass Communicators, Inc. v. FCC*, 266 F.2d 681, 684 (D.C. Cir. 1959). In 1985, the Commission lengthened the initial period a new radio permittee is allowed for construction from 12 to 18 months. 47 C.F.R. § 73.3598(b). In doing so, the Commission noted that it contemplated granting few extensions, stating that, "we have provided adequate time to build broadcast facilities." *Amendment of Section 73.3598*, 102 F.C.C.2d 1054 (1985). "If stations are not constructed within the allowable time, permittees will lose their authorizations. Others more able to commence operations and provide expeditious service to the public will be given the opportunity to apply for the frequency involved." *Id.*

The Commission has regularly identified two policy goals associated with these construction deadlines: (1) to expedite service to the public by encouraging permittees to build in a reasonable time and avoid unwarranted construction delays; and (2) to take permits from those unable or unwilling to construct, making the channel available to new applicants more willing to proceed. *Amendment of Section 73.3598*, 102 F.C.C.2d 1054; *Metrovision, Inc.*, 3 FCC Rcd. 598, 602 (1988). Current Commission regulations establish, in relevant part, that a permittee may be granted an extension of its construction permit if it shows that either: (1) substantial progress has been made, i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or (2)

no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems), but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. 47 C.F.R. § 73.3534(b). Your representations will be evaluated accordingly.

The Commission has held that the "substantial progress" standard requires sustained progress in the construction of the station. *Advanced Television Systems*, 7 FCC Rcd. 3340, 3347 n.61 (1992). As the indicia stated in the rule suggest, a permittee must "demonstrate a firm commitment to construct" in order to meet this standard. *Id.* Therefore, "[a]lthough there is no maximum number of extensions allowed, demonstrable progress must occur during each extension period." *Id.* We may only consider progress made during the most recent construction period in making our evaluation of a permittee's application, *Panvideo Broadcasting, Inc.*, 6 FCC Rcd. 5259 (1991), because otherwise, "a permittee could partially construct a station and then seek extensions indefinitely, based on that initial construction." *Ietrovision*, 3 FCC Rcd. at 602.

The second extension application, BMPH-920317JF, Form 307, Exhibit 1, stated that FM 103 had purchased a transmission tower and transmission line, and had confirmed an order for a transmitter. The firm was then making arrangements for a crew to erect the tower. The current (third) request shows very little new progress; this application alleges that, "[s]ince it acquired WVCA, FM 103 has purchased transmission line cables and has a turn-key bid in from Nationwide Tower Company on a transmitter and transmission tower." Form 307, Exhibit 1 (emphasis added).

FM 103's actions "since it acquired WVCA" are not relevant to our analysis; we must confine our examination to progress made during the May to November, 1992, extension period. Comparing the two requests, your representations indicate that WVCA is no closer to completion now than it was at the beginning of the last 6 month extension. The tower has not been erected, and does not appear ever to have been purchased. Furthermore, FM 103 is still accepting bids for a transmitter for which it previously had a confirmed order. Thus, it appears that you have neither shown the sustained progress toward completion nor demonstrated the firm commitment to construct required by the Commission. See *Texas Gulf Communications, Inc.*, 2 FCC Rcd. 1526 (1987) (Substantial progress not shown because, *inter alia*, permittee had made "no convincing financial commitment to construct the station").

Notwithstanding our finding that FM 103 has made no substantial progress in construction, we may still grant replacement or extension of the construction permit if we find that "reasons clearly beyond the control of the permittee" prevented progress, but "the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction." 47 C.F.R. § 73.3534(b)(3). Both the second application and the third explain that "[p]art of the delay incurred has been due to the failure of construction companies previously engaged by the Permittee or its parent corporation to perform as agreed." However, the Commission has repeatedly held that such failures do not constitute grounds for extension of a construction permit. *Hasler Productions, Inc.*, 2 FCC Rcd. 811 (1987); *Cidra Broadcasters, Inc.*, 2 F.C.C. Rcd. 230 (1987). The Commission,

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granted you the construction permit, and the obligation to build within the time provided was yours alone. It is therefore immaterial whether a permittee relies on third parties to perform some of the construction. Our concern is that the station be timely completed in order to provide service expeditiously to the public. When a permittee makes an independent business judgment to entrust part of the construction to another entity, it does so at its own risk and must bear full responsibility for any unforeseen delays or problems arising from that third party involvement.

Hasler, 2 FCC Rcd. at 812; *Cidra*, 2 FCC Rcd. at 231. Since FM 103's decision to engage third party construction companies was the product of its own independent business judgment, it cannot be considered outside of FM 103's control. FM 103 had the power to seek out reliable construction firms and negotiate contracts which reflected the consequences of a failure to perform. While the selection of construction companies in this case appears to have been unfortunate, it was certainly a deliberate choice and, therefore, cannot support the relief requested. See *Tidewater Christian Communications Corp.*, 2 FCC Rcd. 2549, 2550 (1987).

Even if we were to accept that FM 103's difficulties with construction companies were outside of its control, "they could not continue to serve to excuse construction indefinitely." *Id.* These allegations in November, 1992, have been taken verbatim from the March, 1992, application. FM 103 has taken no steps to "expeditiously resolve the problem" as required by § 73.3534(b)(3). Thus, we find that no extension or replacement is warranted under this section.

Conclusion

Based on the foregoing analysis, grant of your application for extension or replacement of WVCA's construction permit is not warranted. Accordingly, the application IS HEREBY DENIED. Pursuant to 47 U.S.C. § 319(b) and 47 C.F.R. § 73.3534, your construction permit IS HEREBY FORFEITED AND CANCELLED and the call letters WVCA ARE HEREBY DELETED.

Sincerely,



Larry D. Eads
Chief, Audio Services Division
Mass Media Bureau

ENGINEERING STATEMENT

In Support of a PETITION FOR RULE MAKING

**DELETE CHANNEL 287C2 AT SELMA, ALABAMA
SUBSTITUTE CHANNEL 287C2 AT THOMASTON, ALABAMA
SNOWDEN AND RAINEY**

GENERAL

The instant engineering statement is submitted in support of a petition for rule making filed by Earl Snowden and Kenneth R. Rainey, Sr. (Snowden & Rainey). The petitioners are filing a petition for rule making requesting the deletion of unused channel 287C2 at Selma, Alabama, and its subsequence allocation to Thomaston, Alabama. Channel 287C2 was allocated to Selma in MM Docket 84-231. One applicate filed for the CP when the applications window was opened. However, recently the Commission denied a request for a further extension of the CP. Therefore, the channel is presently unused and there are no applications pending.

The fully spaced allocations window for channel 287C2 includes land areas from approximately 18 kilometers west of Selma to 00.00 east of Thomaston.

EXHIBITS EXPLAINED

The following exhibits demonstrate that channel 287C2 can be allocated to Thomaston at the requested reference coordinates. The allotment will; 1) be fully spaced to all existing licensed stations and pending applications and rule

makings, 2) located in an area where a wide choice of antenna sites are available, and 3) provide the required 70 dBu (3.16 mV/m) contour coverage to all of the incorporated area of Thomaston.

Exhibit E, Figure 1 is an allocations study depicting all relevant stations on the 287C2 cochannel and first, second and third adjacent channels. The study also includes pertinent IF channels. As depicted by this study, the reference coordinates are fully spaced.

Exhibit E, Figure 2 is a computer generated map with the separations contours to all pertinent stations shown. This exhibit demonstrates that the petitioner's reference coordinates can be located inside the allocations window while providing the required city grade coverage contour to Thomaston.

Exhibit E, Figure 3 is a service contour map using the requested allocation coordinates as reference. This map depicts the 70 dBu contour and community boundaries of Thomaston. As depicted by this exhibit the Snowden & Rainey PRM meets all of the required technical specifications for the allocation of channel 287C2 at Thomaston once it has been deleted at Selma.

Exhibit E, Figure 4 is a computer generated service contour map depicting that Selma is currently served by six broadcast city contour signals. Depicted in the study is

the 5 mV/m contours of AM stations WTQX - 1570 kHz (5KW), WHBB - 1490 kHz (1KW) and WMRK - 1340 kHz (1KW). Also included is the 70 dBu contours of FM stations WDXX - 100.1 MHz (50KW), WALX - 100.9 MHz (50kw) and WJAM - 97.3 MHz (3.7KW).

CONCLUSION


The instant engineering statement demonstrates that Selma has adequate service from three city grade FM contours and three AM contours, while Thomaston has no local service. The statement also demonstrates that if the petitioners fully spaced allocation coordinates are used, channel 287C2 can provide the required 70 dBu service to the proposed community of license, Thomaston, Alabama.

ENGINEERING CERTIFICATION

STATE OF ALABAMA)
)
BUTLER COUNTY)

Paul Reynolds, being first duly sworn upon oath deposes and says:

- * That he has completed undergraduate studies in the field of communications at the University of Southern Mississippi.
- * That he has completed course requirements for a Masters Degree in communications at the University of Alabama.
- * That he completed basic electronics at DeVry Technical Institute.
- * That he has been operating as an independent communications consultant since 1980.
- * That he is familiar with the Commission's Rules and Regulations.
- * That the engineering portion of this application, the engineering statement and the attached supporting exhibits were prepared by him or under his direct supervision.
- * That all information presented is believed to be true and correct and in full compliance of the technical standards contained in the Commission's Rules and Regulations in affect at the time of the applicant's filing date.


Paul Reynolds

Sworn to and subscribed before, this 31st day of April, 1995.
Brenda L. Bush my commission expires 6-22-97.

ENGINEERING STATEMENT

In Support of a PETITION FOR RULE MAKING

DELETE CHANNEL 287C2 AT SELMA, ALABAMA
SUBSTITUTE CHANNEL 287C2 AT THOMASTON, ALABAMA
SNOWDEN AND RAINEY

32 13 16 N.			Class				Search Date
87 37 52 W.			Current rules spacings				03-30-95
			Channel 287 -105.3 MHz				
Call	Ch#	City	State	Bear'	Dist'	R'grd	Margin
Community of Thomaston			AL	7.7	5.25		
Reference Coordinates:							
North Latitude: 32-16-05							
West Longitude: 87-37-25							
WVCA.C 287C2 Selma			AL	78.6	37.22	190.0	-152.78 *
Of Concern							
Detention Proposed in Instant PRM							
WACTFM 288A		Tuscaloosa	AL	3.9	106.02	106.0	0.02 *
AD288 288C2		Newton	MS	276.4	130.70	130.0	0.70 *
WSLY.C 285C2		York	AL	276.5	59.31	58.0	1.31 *
WSLY.A 285C2		York	AL	276.5	59.31	58.0	1.31 *
AD287 287C3		Aberdeen	MS	337.0	183.59	177.0	6.59 *
DE288 288A		Waynesboro	MS	238.7	115.59	106.0	9.59 *
WABOFM 288A		Waynesboro	MS	238.7	115.59	106.0	9.59 *
DE288 288A		Waynesboro	MS	238.7	115.59	106.0	9.59 *
WWZQFM 287C3		Aberdeen	MS	334.2	195.60	177.0	18.60
AD288 288C3		Bay Minette	AL	193.3	141.86	117.0	24.86
WZHT 289C		Troy	AL	101.1	141.25	105.0	36.25
AD288 288A		Newton	MS	274.7	145.37	106.0	39.37
WKGTFM 286A		Century	FL	169.5	152.45	106.0	46.45

Ch. 287 - Class C2

WABOFM

N. Lat. 32 13 16
W. Lng. 87 37 52

0 50 100

